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Publicity and Image Rights in Scots Law

Gillian Black[☆]

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A. INTRODUCTION

The commercial exploitation of name and image has become commonplace in recent decades. Companies typically harness the reputation and glamour of a

[☆] Lecturer, University of Edinburgh. The author wishes to thank Professor Kenneth Reid and Dr Claudio Michelon for their comments on a draft of this article and Professor Hector MacQueen for many helpful discussions on publicity in Scots law.

celebrity in order to promote their goods and services. David Beckham was allegedly paid \$20 million for his promotion of Emporio Armani underwear.¹ Gossip magazines are burgeoning—each dependent on providing the reading public with a quota of photographs and “news” items about the latest stars from music, media, sport and reality TV. In the case of celebrity weddings, the fees for the exclusive right to publish photographs and the inside story frequently reach seven-figure sums.² Since these trends of exploitation are evident (and expanding) in the commercial sphere, it may be thought that whatever legal regulation exists must be satisfactory. Yet this is far from the case. And as the gulf between the practice and the law in this area continues to grow, so the question arises as to what, if anything, should be the response in Scots law. This article seeks to address that question.

It is necessary to start by examining the nature of the commercial exploitation. What is its subject matter, and to what use is it put? Thereafter I will turn to the legal response in other jurisdictions before considering a range of possible legal actions in Scotland that may be relevant to publicity. The article concludes with a suggested home for publicity and image rights in Scots law.

Of course, this approach assumes that there is indeed a problem in search of a solution—something which many writers in the field would dispute. While acknowledging the absence of legal protection, their response would be that no protection is required or justified.³ This article does not try to explore the complex and lengthy arguments for and against legal protection for publicity. My own view, explored further elsewhere, is that publicity rights can be justified, on both economic and dignitarian grounds.⁴ Moreover, the gap between global practice and the response in Scotland, which is undeniable, justifies an attempt to clarify and classify the law.

1 Evidence of such deals can be hard to come by: online articles and blogs give this figure for the Emporio Armani deal. See e.g. www.adpunch.org/entry/david-beckham-signs-underwear-deal-for-giorgio-armani/.

2 Recent examples involving OK! include David and Victoria Beckham (£1m, 1999); Michael Douglas and Catherine Zeta-Jones (£1m, 2000); Jordan and Peter Andre (£2m, 2005); Ashley Cole and Cheryl Tweedy (£1m, 2006); and Wayne Rooney and Coleen McLoughlin (£2.5m, 2008). Since official details of such arrangements are not published, definitive authority is hard to produce: all details quoted are taken from BBC Online or Wikipedia.

3 H Carty, “Advertising, publicity rights and English law” [2004] IPQ 209; H Beverley-Smith, *The Commercial Appropriation of Personality* (2002); M Madow, “Private ownership of public image: popular culture and publicity rights” (1993) 81 Cal L Rev 125.

4 See further G Black, *Image Rights and Publicity: Exploitation and Legal Control* (forthcoming, 2010). For alternative perspectives, see the texts cited at n 3.

B. DELINEATING PUBLICITY EXPLOITATION

Before exploring solutions it is first necessary to set out the problem. This involves a detailed examination of what is involved in publicity exploitation in practice. Regardless of jurisdiction or legal system, publicity practice in the Western world involves the use of some identifying feature of the individual in order to promote or publicise a product, service or event. Thus, the twin elements to be defined are use and subject matter.

(1) Use

While writers have devised a range of categories reflecting the types of exploitation practised, the essential nature of this exploitation can be reduced to three categories: media use; promotion and advertising; and merchandising.⁵ Each can be illustrated by recent high-profile examples.

Media use is exemplified by Jennifer Lopez's exclusive licence to *People* magazine in 2008 for publication of photographs of her new-born twins. The fee was (allegedly) \$6 million.⁶ What gave rise to the high fee was not the publication of photographs of twins, but the combined fact that their mother was one of the most famous female pop and R&B singers in the US and that the publication rights were exclusive. Similarly, of all the weddings that took place in 2008, the only one that generated a fee of £2.5 million for the right to exclusive magazine coverage was that of Wayne Rooney and Coleen McLoughlin. Alongside the exclusive photographs there is usually an exclusive interview. This use therefore relies on images and information about the individual, typically in an exclusive deal.

Promotion use focuses on advertising and promotion deals, such as David Beckham's advertising and endorsement of products as diverse as soft drinks (for Pepsi) and sport-related products such as football boots (for Adidas). Here the company is paying for the individual to "tell... the relevant public that he approves of the product or service or is happy to be associated with it. In effect he adds his name as an encouragement to members of the relevant public to buy or use the service or product."⁷ Where an individual advertises something related to his particular fame or expertise, it can be referred to as a "tools of the

⁵ Writers typically recognise variations on these categories, but the essentials can be reduced to these three practices: see O Goodenough, "Rethorising privacy and publicity" [1997] IPQ 37 at 41-42; Carty (n 3) at 216-217; Beverley-Smith, *Commercial Appropriation* (n 3) 210-211; C Colston and K Middleton, *Modern Intellectual Property Law*, 2nd edn (2005) 632.

⁶ See www.popcrunch.com/jennifer-lopez-twins-pictures-people-magazine-march-2008/.

⁷ *Irvine v Talksport Ltd* [2002] 1 WLR 2355 at para 9 per Laddie J.

trade” endorsement. But whether the promotion is a “tools” or “non-tools” one, the individual is promoting the goods and services of a third party rather than a business of his own. Often, however, there is an element of self-promotion, for celebrities will usually ensure that the brands that they advertise and endorse fit their own image and profile.⁸

Merchandising use can be illustrated by the vast number of calendars, t-shirts, mugs, posters and so forth featuring the names and images of pop, film and sports stars.⁹ Here the individual becomes the product: the purchaser does not buy a Kylie Minogue calendar because he needs a calendar and trusts Ms Minogue to get the dates right; he buys it because it bears images of her. The individual is demonstrating his support for and allegiance to the individual by purchasing an “image carrier”.¹⁰ In *Irvine v Talksport*,¹¹ Laddie J contrasted merchandising with the endorsement or promotion use in relation to “the sale of memorabilia relating to the late Diana, Princess of Wales”:

A porcelain plate bearing her image could hardly be thought of as being endorsed by her, but the enhanced sales which may be achieved by virtue of the presence of the image is a form of merchandising.

When there is public use of an individual’s name or image, that use can be reduced to one of the categories just described: it will concern exploitation either in the media, or through the promotion or advertisement of goods or services, or by way of merchandising when the name or image is attached to goods.

In all cases, the use must be public. Private use may give rise to distinct legal issues, but it is not relevant to the question of publicity. The requirement for public use is implicit in each of the three uses discussed above: none could be achieved by keeping the relevant publication, promotion or merchandising private. Public use does not, however, equate to commercial or for-profit use, since a charity or other non-profit organisation could make use of an individual to promote its cause without seeking directly to raise income.

8 See A Milligan, *Brand it like Beckham* (2004), and also *Irvine v Talksport Ltd* [2003] 2 All ER 881, where the Court of Appeal (at paras 60-62) recounted evidence given by Irvine that it would devalue his image to be associated with a minor brand such as Talksport Radio, in contrast to his deals with glamorous brands such as Hilfiger.

9 A good example is the Jonas Brothers, a boy band from America, who have a website (www.jonasbrothersmerch.com) dedicated to merchandising which is separate from their main fan site.

10 In the words of the Trade Marks Registry: see G Black (published as G Davies), “The cult of celebrity and trade marks: the next instalment” (2004) 1 : 2 *SCRIPT-ed* 230.

11 [2002] 1 WLR 2355 at para 9.

(2) Subject matter

Having identified the uses through which publicity exploitation takes place, we may now do the same for the subject matter: what exactly is being exploited? A leading American commentator, J T McCarthy, asks (and answers) the question in this way:¹²

What aspects of human identity does the right of publicity protect? It protects anything by which a certain human being can be identified. This covers everything: personal names, nicknames, stage and pen names, pictures, and persona in a role or characterization. It can also include physical objects which identify a person ... And the Bette Midler decision¹³ reaffirms that a person can be identified by voice.

“Persona”, Professor McCarthy suggests, is preferable as the collective term for the elements of human identity exploited, since “the traditional phrase ‘name and likeness’ was inadequate to describe the many aspects of a person which can identify him or her”.¹⁴ The all-embracing notion of what is covered by a right of publicity in the US is reflected in state legislative codes which provide for a right of publicity or commercial exploitation of identity.¹⁵

The approach taken in the European Civilian traditions has been synthesised by Johann Neethling, who refers to the “appropriation of a person’s identity (name or likeness)”.¹⁶ “Identity” is then defined – in the context of the (separate) right to identity¹⁷ – as a person’s “uniqueness which individualizes him as a particular person and this distinguishes him from others ... Identity is manifested in various indicia by which a person can be recognized, such as his name, image, voice, fingerprints, handwriting, etc.”¹⁸ The key idea which emerges is recognisability.

David Vaver also turns to the idea of identification and recognition, which is present in both the European and the American interpretations of identity, noting that “[l]ikeness’ cannot mean merely a person’s unadorned or nude appearance;

12 J T McCarthy, “Public personas and private property: the commercialization of human identity” (1989) 79 Trade-mark Reporter 681 at 689.

13 *Bette Midler v Ford Motor Company* 849 F 2d 460 (9th Cir 1988).

14 J T McCarthy, *The Rights of Publicity and Privacy*, 2nd edn (2001) para 4:45. See also D Westfall and D Landau, “Publicity rights as property rights” (2005-2006) 23 Cardozo Arts and Ent LJ 71 at 91 and 93-96, where the authors reflect on the expansive range of indicia and its causes.

15 For example, the Indiana right of publicity is defined as a property interest in the personality’s name, voice, signature, photograph, image, likeness, distinctive appearance, gestures, or mannerisms: see the Indiana Code tit 32 art 36 at Ch 1 s 7; and the State of Washington creates a property right over the name, voice, signature, photograph or likeness of the individual and then defines each term (except voice) in some detail: see the Revised Code of Washington tit 63 Ch 60 at ss 10, 20.

16 J Neethling, “Personality rights”, in J M Smits (ed), *Elgar Encyclopaedia of Comparative Law* (2006) 530 at 543.

17 The right to identity is infringed where an individual’s identity is used “in a way which cannot be reconciled with his true identity”: see Neethling (n 16) at 540.

18 Neethling (n 16) at 540.

a person's characteristic dress may be as much a part of his personality as his face".¹⁹ He extends the scope of protection to any aspect which can identify the individual in the minds of the public:

Betty Grable's legs were at least as valuable an asset to her as her face, and at least as recognizable by the crowds who flocked to see her movies... There should be no a priori exclusion even of a person's big toe if such has become sufficiently known as constituting part of his likeness.

Recognisability and identification, therefore, are central aspects of the exploitation of the individual in publicity practice. But while some element of recognisability, and thus reputation, is common, it is not essential. Some of the earliest American cases involved use of photographs of unknown individuals in advertisements.²⁰ Moreover, even where there is a reputation, there is no requirement for it to be positive: Ryanair famously used the image of Charles Ingram to promote cheap flights if one needed to leave the country quickly.²¹ Although reputation is likely to be a significant element in most publicity exploitation, it is not determinative. One reason for this is that it can never be the sole element exploited. Reputation – or fame or celebrity – is intangible and must therefore be represented through tangible elements of the individual. Thus image, name, voice or other iconic assets are necessary. Since all individuals have a name, image and voice, all individuals can potentially be exploited in this way. In this article, the term "individual" will be used to refer to the person who is the subject of publicity exploitation, whether or not the person is a celebrity.

A final element in publicity exploitation is to ask whether the individual consented. Was the exploitation authorised or unauthorised? In the absence of a clear right to grant or withhold consent, this question may seem unnecessary. Nevertheless, it is very relevant in practical terms. Authorised exploitation generates a higher income for the individual. For example, *Douglas v Hello!*²² reveals that, whereas the Douglasses were awarded less than £15,000 by the High Court in compensation for *Hello!*'s unauthorised publication of their wedding photographs, the value of their licence with *OK!* for exclusive publication rights was £1 million. In cases of authorised use, the legal issue will focus on the right granted by the individual; in cases of unauthorised use, the concern is with the

19 D Vaver, "What's mine is not yours: commercial appropriation of personality under the Privacy Acts of British Columbia, Manitoba and Saskatchewan" (1981) 15 U Brit Colum L Rev 241 at 274.

20 *Roberson v Rochester Folding Box Co* 171 NY 538 (1902); *Pavesich v New England Life Insurance Co* 50 SE 68 (1905). These cases were litigated on the ground of invasion of privacy, in the absence of a publicity right at the time.

21 Ingram had been found guilty of conspiracy to cheat the television programme, *Who Wants to be a Millionaire?*.

22 *Douglas v Hello! (No 3)* [2006] QB 125.

rights infringed, if any, in relation both to the individual and to any authorised parties. Again, the Douglasses' wedding illustrates this, since the subsequent litigation against *Hello!* was raised not only by the Douglasses but also by *OK!*, their authorised publisher.²³

(3) Some terminology

In the discussion that follows, "publicity" will be taken to comprise the public use of an individual's persona in the media information, promotion and merchandising uses; and "persona" will be used to denote the identifying elements of an individual – commonly image and name – which are representative of the intangible reputation, where one exists. Where a distinction needs to be drawn between exploitation which has the consent of the individual and that which does not, the terms "authorised" and "unauthorised" will be used.

C. OBSERVATIONS FROM ABROAD

Since exploitation of publicity and celebrity is a world-wide activity, it is helpful to consider in brief how other jurisdictions have responded to the practice. More particularly, by considering two different responses, it will be possible to draw out two conclusions which are relevant to Scots law. The first concerns the problem of property, illustrated by the US approach; the second is the tension between commerce and dignity, for which guidance can be drawn from the Civilian systems of Europe.

(1) Publicity rights as property rights

America is generally recognised as having the earliest publicity right – perhaps not surprising in a nation which is home to Hollywood and Broadway. Celebrity culture and the commercialisation of celebrity image resulted in affronts to privacy,²⁴ which in time evolved into publicity claims. The case which is credited with first recognising a publicity right is *Haelan Laboratories v Topps Chewing Gum Inc*,²⁵ decided in 1953. The plaintiff had a contract with a baseball player for the exclusive right to use his image on cards in connection with sales of the plaintiff's chewing gum. When the player subsequently entered into a contract with the defendant for the same purpose, the plaintiff sued. What is particularly

²³ *OBG Ltd v Allan* [2008] 1 AC 1.

²⁴ S D Warren and L D Brandeis, "The right to privacy" (1890) 4 Harvard L Rev 193.

²⁵ 202 F 2d 866 (2nd Cir 1953). Within a year of the judgment, Professor M B Nimmer had published his seminal article, "The right of publicity" (1954) 19 Law and Contemporary Problems 203.

interesting is that the action was raised against the commercial rival not the errant player. Nonetheless, the Second Circuit allowed recovery, with the words of Judge Frank giving rise to a new field of law:²⁶

We think that, in addition to and independent of the right of privacy (which in New York derives from statute), a man has a right in the publicity value of his photograph... Whether it be labelled a “property” right is immaterial; for here, as often elsewhere, the tag “property” simply symbolizes the fact that courts enforce a claim which has a pecuniary worth.

Today the property status of publicity in the US is assured, despite the problems it sometimes engenders. Could Scots law protect interests in persona in a similar manner? If persona is to be owned, it must, of course, be capable of classification as a “thing”. But even if a wide notion of “thing” is accepted – Neil MacCormick, for example, would include not only horses and houses but also rights such as shares in a company²⁷ – it seems improbable that this could extend to persona, at least in Scotland. For the essence of “things”, Professor MacCormick continues, is that they are “conceived as durable objects existing separately from and independently of other objects and of persons, subject to being used, possessed, and enjoyed by persons, and capable of being transferred from one person to another without loss of identity as that very thing”.²⁸ A “thing”, on this view, must meet the criteria of durability, separability and transferability.

Persona does not sit easily with MacCormick’s definition. Only the durability criterion presents no problems (at least during life): both separability and transferability do. It is meaningless to talk of one’s image, for example, as separate or separable from one’s corporeal body or as capable of transfer without loss of identity. The whole notion of persona is so intricately bound up with the individual that to attempt to separate out, and transfer on, the constituent (and intangible) elements of a publicity right seems hardly possible. The relationship between persona and the individual is fundamental – and, James Penner would argue, fatal, since “for a thing to be held as property, we must not conceive of it as an aspect of ourselves or our ongoing personality-rich relationships to others”.²⁹

There are also practical objections. If persona were to be treated as a thing in Scots law, it would be subject to the usual consequences of property ownership. Thus it could be assigned outright (not simply licensed) or used to satisfy the claims of a creditor. Yet to contend that persona could form part of an individual’s

²⁶ At 868.

²⁷ D N MacCormick, *Institutions of Law* (2007) 136. On the question of whether rights can be owned, see G L Gretton, “Ownership and its objects” (2007) 71 *Rabels Zeitschrift* 802.

²⁸ MacCormick, *Institutions of Law* 136 (note omitted).

²⁹ J E Penner, *The Idea of Property in Law* (1997) 126.

estate on bankruptcy fails to reflect the reality of the situation. The considerable problems experienced in the US in this respect have been examined by Westfall and Landau, who conclude that “it seems relatively clear that publicity rights should not be treated as property for purposes of bankruptcy”.³⁰ Yet, at least in Scotland, it is difficult to see how persona could be property for some purposes but not for others.

Persona, by its very definition, is an inherent part of each individual,³¹ inseparable and non-transmissible without loss of identity – quite literally, in this case. By failing to meet the criteria for thinghood, it falls outside the scope of ownership in Scots law. In short, a property law solution will not do.

(2) Publicity rights as personality rights

To use personal indicia of identity for commercial exploitation creates a tension which lies at the heart of all legal and theoretical discourse surrounding publicity.³² How should law respond to a practice which has a strong commercial element yet deals in something inherently unique and personal to each individual? Is it a privacy and human rights concern or does it relate to property rights and goodwill? As the previous section has demonstrated, persona could not be the subject of ownership in Scots law. An alternative approach would be to consider whether personality rights offer appropriate protection. Jurisdictions such as France and Germany provide an insight into how the commercial/dignitarian tension can be resolved by way of such rights.

Personality rights are “a separate category of rights, distinguishable from real, personal and immaterial property rights”.³³ Long familiar in Civil law jurisdictions,³⁴ the term is now beginning to gain currency in Scotland.³⁵ Where publicity rights are treated as a subset of personality rights there is likely to be an emphasis on the dignitarian aspects, for concepts such as privacy and human dignity are central to any legal protection of personality. This means that the *commercial* significance of infringement in publicity situations may be marginalised. The end result is that in many cases only *solatium* will be available,

30 Westfall & Landau (n 14) at 117, and see also 99-117 (in the context of divorce and bankruptcy).

31 See, for example, *Reklos v Greece* [2009] EMLR 16.

32 Most notably the debate on justifications for such a right.

33 Neethling (n 16) at 535.

34 For convenient overviews, see Neethling (n 16); H Beverley-Smith, A Ohly and A Lucas-Schloetter, *Privacy, Property and Personality* (2005) chs 4, 5.

35 N R Whitty and R Zimmermann (eds), *Rights of Personality in Scots Law: A Comparative Perspective* (2009) (reviewed at 541 below); E C Reid, *Personality, Confidentiality and Privacy in Scots Law* (forthcoming, 2010). The opening chapter of the latter gives a historical introduction to the topic with particular emphasis on Scotland.

and thus “the courts deny adequate compensation in the most serious cases of personality right infringement”.³⁶

Although Civilian jurisdictions treat publicity within the framework of personality rights, the way in which they do so varies from jurisdiction to jurisdiction. This reflects the tension between commerce and dignity, forcing courts and legislature to reconcile two opposing interests, for “while the attributes of human personality, like name, reputation, image, voice, and privacy, have traditionally been seen as extra-patrimonial rights without monetary value, today these rights are being increasingly patrimonialized and brought into commerce”.³⁷ The result has been described as a “patrimonialized extra-patrimonial right”,³⁸ which varies from jurisdiction to jurisdiction and which may be either “monistic” or “dualistic”.³⁹

The dualistic model uses two different rights, one positive and patrimonial, the other negative and extra-patrimonial, to protect the interests in exploitation and protection of publicity.⁴⁰ This can be seen for example in French law, where a distinction is made between the right *to* one’s image, which is an “inherent part of the person”, and the right *over* one’s image, which is “a commodity to be exploited”.⁴¹ The consequence is that “a general personality right does not fit into French law”.⁴² Instead, protection is achieved through dual rights protecting material and subjective interests respectively.⁴³

Under the monistic approach, which is favoured, for example, in Germany,⁴⁴ a single right, the general personality right,⁴⁵ protects both the economic and

36 Beverley-Smith, Ohly & Lucas-Schloetter, *Privacy, Property and Personality* (n 34) 143.

37 E H Reiter, “Personality and patrimony: comparative perspectives on the right to one’s image” (2001-2002) 76 *Tulane L. Rev* 673 at 673.

38 Reiter (n 37) at 673.

39 For a broad summary of these differences, see N R Whitty, “Overview of rights of personality in Scots law”, in Whitty & Zimmermann (eds), *Rights of Personality* (n 35) at para 3.4.9.

40 See, for example, Beverley-Smith, Ohly & Lucas-Schloetter, *Privacy, Property and Personality* (n 34) 11; Neethling (n 16) at 543; Whitty (n 39) at para 3.4.9 (noting that the American approach can also be regarded as dualistic).

41 Reiter (n 37) at 684-685. Reiter equates the extra-patrimonial right to a negative right, and the patrimonial and commercial right to a positive one. See also E Logeais, “The French right to one’s image: a legal lure?” [1994] *Ent LR* 163 at 165.

42 Beverley-Smith, Ohly & Lucas-Schloetter, *Privacy, Property and Personality* (n 34) 153.

43 Beverley-Smith, Ohly & Lucas-Schloetter, *Privacy, Property and Personality* (n 34) 154-157; Logeais (n 41) at 165.

44 Neethling (n 16) at 543. See also Beverley-Smith, Ohly & Lucas-Schloetter, *Privacy, Property and Personality* (n 34) ch 4; J Klink, “50 years of publicity in the US and the never-ending hassle in Europe” [2003] *IPQ* 363 at 380; C Waelde and N R Whitty, “A rights of personality database”, in Whitty & Zimmermann (eds), *Rights of Personality* (n 35) at para 11.4.2.

45 This was developed by the judiciary through case law, emanating from the constitutional right to dignity. German law also recognises a number of specific statutory rights which protect aspects of personality,

the dignitarian interests in publicity. This was specifically addressed by the *Bundesgerichtshof* in the *Marlene Dietrich* case,⁴⁶ brought by Dietrich's daughter against a producer who had sold various items of "Marlene" merchandising. In reaching its decision, the court "stressed the two aspects of the personality right which protected not only ideal, but also economic interests".⁴⁷ Consequently, unauthorised use of name, image or reputation could give rise to a claim for damages or unjustified enrichment, as well as to claims for *solatium*.

The Civilian jurisdictions show that a personality right can both respect an individual's autonomy and dignity in his persona while at the same time recognising persona's commercial significance. But personality rights are too undeveloped in Scotland for this to be a plausible model to follow.

D. SCOTTISH RESPONSES

How then does Scots law deal with publicity? The short answer is that it does not. Although the commercial practice exists, the academic and legal analyses are under-theorised. There is no statute which regulates publicity use of persona, nor have there been any recent cases – although there are two older cases which could arguably be classed as involving publicity rights.

(1) Early cases

The first case is *Wilkie v McCulloch & Co*, decided in 1823 and reported only briefly.⁴⁸ The pursuer, Wilkie, invented a new species of plough which, although he had no patent in respect of it, bore his name. The defenders manufactured plough boards, which they sold with the name "Wilkie" or "Wilkie's newest pattern" stamped upon them. Wilkie's claim was that "although he had not the exclusive privilege of making and vending these improved ploughs, yet he was entitled, at common law, to prevent any one from impressing his name on those which were not made by him, or under his authority".⁴⁹ The First Division adhered to the interdict granted by the Lord Ordinary to prevent the defenders from so doing. This offered Wilkie protection which was based, not on his interest

such as the right to one's name (§ 12 BGB) and to one's image (§ 22 KUG). See Beverley-Smith, Ohly & Lucas-Schloetter, *Privacy, Property and Personality* (n 34) 105-124; Neethling (n 16) at 530, 539-540. Beverley-Smith et al also note (110) that the general personality right can act as an interstitial right where the specific rights fail.

46 BGHZ 143, 1 Dec 1999, cited in Beverley-Smith, Ohly & Lucas-Schloetter, *Privacy, Property and Personality* (n 34) 104 ff.

47 Beverley-Smith, Ohly & Lucas-Schloetter, *Privacy, Property and Personality* (n 34) 104.

48 (1823) 2 S 413.

49 At 414.

in the plough (which had not been copied), but on his name. Unfortunately, the legal basis for this judgment is obscure, thus limiting its utility.

The second case arose eighty years later. In *McCosh v Crow*,⁵⁰ Mr McCosh's daughters sat for studio photographs, copies of which were duly bought by McCosh. However, enlargements of the photographs were made and displayed on the walls of the studio. Although McCosh apparently had no objection to this while the studio was owned by the original photographer, once it had been sold to Crow he requested that the images be taken down and, when Crow refused, successfully sued for interdict to prevent the photographs from being exhibited. The Second Division held that the right to take photographs depended on the agreement of the customer and that the resulting contract was a confidential one which would be breached where the images were displayed against the customer's wishes.⁵¹ While there are undoubtedly privacy- and confidentiality-related concerns here, there is also a publicity consideration, in respect of the public display of lawfully-taken photographs. Moreover, the words of Lord Young, dissenting, echo the objections still raised today against publicity rights: "Monthly, weekly, or indeed daily experience of drawings published in this and other countries shews that the law does not readily recognise the exhibition and publication of likenesses as actionable".⁵²

(2) Contemporary models

Despite these early cases involving the unauthorised use of name and image, there is little evidence of their subsequent application. The question thus remains: how should Scots law regulate publicity?⁵³ The answer depends on the key characteristics, in law, of publicity exploitation. As the previous section made clear, publicity exploitation involves the public use of an individual's persona in the media, promotion or merchandising. The subject matter of this use, persona, gives rise to the two fundamental propositions which shape the legal analysis. One is that persona, as an inherent part of the individual, is not capable of being owned; the other is that there is a tension between commercial exploitation and the dignitarian interests which are at the heart of publicity rights.

It is apparent from the discussion above that ownership of the individual's name and image is not an option in Scots law. The same is true of the use of personality rights, at least in the full-blown sense in which such rights are

⁵⁰ (1903) 5 F 670.

⁵¹ At 676 per Lord Justice-Clerk Macdonald, at 679 per Lord Trayner.

⁵² At 678.

⁵³ This is of course a very different question from "should Scots law regulate publicity?" for which see text at nn 3-4 above.

accepted in many Civilian jurisdictions. What other options are available? There are four that present themselves, and not the least of their attractions is the success they have offered to litigants in England. Although a Scottish court would not be bound by these precedents, it is difficult to imagine counsel not taking advantage of the groundwork carried out already in the Court of Appeal and House of Lords.

(a) Passing off

The first option is passing off. This delict protects the goodwill in a business name and brand, where the pursuer can prove the three elements of goodwill, misrepresentation, and damage. In the English case of *Irvine v Talksport*,⁵⁴ Eddie Irvine, the F1 racing driver, successfully sued Talksport Radio on the basis of passing off for its unauthorised use of his image in a publicity brochure. The use of passing off in this context has been extensively criticised.⁵⁵ A further problem is that, arguably, Irvine's success depended on the fact that Talksport had doctored his photograph. While Talksport had obtained the picture legally, from an image bank, it had altered it so that, instead of listening intently on a mobile phone, Irvine was listening intently to a Talksport-branded radio. It was this which created the misrepresentation and thus the link in the minds of recipients between Irvine and Talksport. It seems significant that no action was taken by Irvine against Talksport's use of another photograph in the same brochure which had not been doctored. This suggests that passing off would fail to protect where a photograph alone is used, without the image being either doctored or accompanied by a statement which created a false connection between the individual and the company (such as "This man loves our Acme widgets"). A further hurdle for prospective pursuers is that passing off protects goodwill, so that where the individual has no established goodwill then this doctrine has nothing to offer. In summary, while *Irvine v Talksport* raises the possibility that individuals whose persona is used without consent could sue for compensation in delict, it also bars the way for those who have no goodwill (non-celebrities) or where there is no misrepresentation.

(b) Privacy

A second option is privacy. While this has been developed extensively in the English courts, in a post-Human Rights Act world, to refine breach of confidence

⁵⁴ [2002] 1 WLR 2355 affd [2003] 2 All ER 881.

⁵⁵ See H Carty, "Personality rights and English law", in Whitty & Zimmermann (eds), *Rights of Personality* (n 35) 383; Beverley-Smith, Ohly & Lucas-Schloetter, *Privacy, Property and Personality* (n 34) ch 2.

and article 8 privacy rights, the Scottish jurisprudence is considerably more limited. Nevertheless, it is difficult to imagine the Court of Session overlooking the speeches of the House of Lords in cases such as *Campbell v MGN*,⁵⁶ where Lord Nicholls stated that in privacy cases the action for breach of confidence “has now firmly shaken off the limited constraint of the need for an initial confidential relationship . . . The essence of the tort is better encapsulated now as *misuse of private information*.”⁵⁷

Where an individual’s private information, including images and other indicia, is used in breach of the article 8 right to privacy or in breach of confidence, a right of recovery will almost certainly lie in the Scottish courts. Regardless of the merits of this development,⁵⁸ however, it is only of limited use in publicity cases. Most critically, it will not arise where there is nothing inherently private in what has been used, other than the fact that it contains a representation of the individual by way of name, image, voice, or other indicia. Only where there was a reasonable expectation of privacy – which was not outweighed by the article 10 right to freedom of expression – will privacy assist. Breach of confidence presents a separate but closely-related ground, which arises where the image or information in question was disclosed in breach of an obligation of confidence. Again, defences are possible, such as the public interest in the information in question.⁵⁹

A fictional example shows the limits of passing off and privacy in this context. Imagine an advertising campaign run by a brewer. This uses a photograph of Andy Murray celebrating his first win at Wimbledon, to which the brewer has added the caption “Our beer makes you feel this good”. It is not obvious that there is any infringement of Murray’s privacy, for the image was taken at a very public event and Murray can have had no expectation of privacy in respect of it. Nor is there any evident claim of passing off unless there is a misrepresentation suggesting a connection between Murray and the beer. Indeed advertisers can take steps to alleviate any risk by using wording which emphasises that the individual featured

⁵⁶ [2004] 2 AC 457.

⁵⁷ Para 14 (emphasis added); also para 17 where Lord Nicholls says that: “The time has come to recognise that the values enshrined in Articles 8 and 10 are now part of the cause of action for breach of confidence.” See also *Murray v Big Pictures* [2009] Ch 481 at para 24 per Sir Anthony Clarke MR.

⁵⁸ And there are certainly critics of these developments in relation to publicity: see H Carty, “The common law and the quest for the IP effect” [2007] IPQ 237; C Michalos, “Image rights and privacy: after *Douglas v Hello!*” [2005] EIPR 384; C Michalos, “*Douglas v Hello!*: the final frontier” [2007] Ent LR 241; R Arnold, “Confidence in exclusives: *Douglas v Hello!* in the House of Lords” [2007] EIPR 339.

⁵⁹ The classic exposition of the doctrine, in English law, is in *Coco v A N Clark (Engineers) Ltd* [1969] RPC 41, while the House of Lords provided a more recent analysis in the *Spycatcher* case: *Attorney-General v Guardian Newspapers (No 2)* [1990] 1 AC 109. For an analysis of breach of confidence in Scots law, see H MacQueen et al, *Contemporary Intellectual Property: Law and Policy* (2007) ch 18.

has no official connection with the product. Accordingly, Murray would be unable to rely on the English precedents of *Irvine v Talksport*⁶⁰ and *Douglas v Hello!*⁶¹

(c) *Defamation*

Next there is defamation. The unauthorised use of persona may turn out to be defamatory,⁶² although, since the user is typically trying to harness the benefits of positive association, this will not be common. A further obstacle is the availability of the defence of *veritas*.

(d) *Data protection*

A final option is to seek redress for unlawful or unfair processing of personal data under the Data Protection Act 1998. Where the name or image (personal data) of an individual (the data subject) is used (processed) by a third party (the data controller) without consent or other lawful justification, this will breach the first data protection principle.⁶³ Under section 10(1) of the Act, the data subject has a right to request that the data controller stops any processing where (a) this processing “is causing or is likely to cause substantial damage or substantial distress to him or to another, and (b) that damage or distress is or would be unwarranted”.⁶⁴ There is also a right to compensation.⁶⁵

In the two most high-profile claims, the English courts awarded the princely sum of £50 to each of the claimants: Naomi Campbell in *Campbell v MGN*⁶⁶ and Catherine Zeta Jones and Michael Douglas in *Douglas v Hello!*⁶⁷ In both cases the data protection award was made alongside a higher award of damages for infringement of privacy under article 8 and misuse of private information, as discussed above. This sends a signal that the data protection element is secondary or subsidiary to the privacy claim. Moreover, the Data Protection Act provides for specific defences where the data is processed for the “special purposes” of journalism, artistic purposes, and literary purposes.⁶⁸ Although the claimants in *Campbell* and *Douglas* overcame this defence, it does add a further hurdle for individuals in a publicity action.

60 [2002] 1 WLR 2355 affd [2003] 2 All ER 881.

61 [2006] QB 125.

62 *Tolley v Fry* [1931] AC 333.

63 The defined terms are set out in s 1, and the principles in Sch 1 pt 1, of the Data Protection Act 1998.

64 Section 10(1)(a), (b).

65 Data Protection Act 1998 s 13.

66 [2004] 2 AC 457.

67 [2006] QB 125.

68 Data Protection Act 1998 s 3.

(3) The position in summary

If and when the law in Scotland responds to publicity rights,⁶⁹ it seems most likely to do so by *ad hoc* development, along the lines of similar *ad hoc* development in England. Shared legislation on human rights and data protection paves the way for the use of English authority in privacy cases, while commercial interests dictate that pursuers in Scotland would be likely to attempt to follow the example of passing off set by *Irvine*. The prospect can hardly be described as attractive. Piecemeal development would involve cases being shoehorned into the nearest available cause of action, while the low incidence of litigation risks inconsistent or unprincipled development. Not only is the pursuer ill-served by such an approach, but the defender also stands to lose, since defences will not be developed or examined according to the parameters of publicity use but according to the defences for the original cause of action. For these reasons it is important that Scots law should seek to take a principled approach to the reality of publicity exploitation and, since existing causes of action offer only partial protection, the question arises whether there is a more appropriate home for a right to use and control persona.

E. EXCLUSIVE PRIVILEGE

While persona cannot be a thing subject to ownership, there is another right, often classified as real, which does not require a thing. Exclusive privilege is a monopoly right,⁷⁰ “an exclusive, and valuable, right to do something and, hence, to stop others from doing the same thing”.⁷¹ Adam Smith classified exclusive privileges as real rights through an analogy with the rights of an heir to inherit: “[i]f therefore we account the right of inheritance to be a real right, as it certainly is, all other exclusive privileges will for the same reason be accounted real rights”.⁷² Exclusive privileges were commonly seen as evils, “contrary to the great charter of our liberties”,⁷³ which damaged the interests of traders through the “three incidents of a monopoly, the increase of price, the diminution of quality,

69 An action was raised by J K Rowling and her husband on behalf of their two-year-old son against the photographic agency and the publisher of images of the family in an Edinburgh street, but the publication and consequently the litigation took place in London.

70 Adam Smith, *Lectures on Jurisprudence* (eds R L Meek, D D Raphael and P G Stein, 1978) 11.

71 K G C Reid, *The Law of Property in Scotland* (1996) para 5, with reference to Smith and Hume.

72 Smith, *Lectures on Jurisprudence* (n 70) 11. Reid, *Property* (n 71) para 5 considers the classification of the right of the heir as real as “doubtful”.

73 That is, *Magna Carta*: see J D Collier, *An essay on the Law of Patents for New Inventions*, 2nd edn (1803) 29.

and the impoverishing artificers in other traders by such increase, and diminution multiplying the difficulties in the maintenance of their families”.⁷⁴

(1) From government to commerce

Some of the earliest examples of exclusive privilege related to the exercise of royal and feudal powers. In addition to the powers exercised by the monarch (described by one French observer as “great and extraordinary privileges”),⁷⁵ other office- and land-holders in Scotland had powers to prosecute crimes and levy taxes. Lords of Regality, for example, enjoyed the exclusive privilege to levy and collect taxes upon their lands for the King’s officers. According to Kames: “This exclusive privilege, in whatever manner introduced, came to be fully established in lords of regality, as will appear from the act 5. parl. 1440, and act 26. parl. 1449”.⁷⁶

These privileges were powers to exercise functions which are nowadays exercised by central or local government. Seemingly they owed their existence to Acts of Parliament rather than to any common law or feudal rights. Over time, however, the notion of exclusive privilege began to evolve so that, at least by the eighteenth century, a privilege was more likely to denote a right enjoyed in relation to commerce, notably by a Guild or incorporation of craftsmen. There is evidence of considerable litigation between these Guilds and outsiders, with the Guilds seeking to protect their monopoly interest from non-members who wished to enjoy the protected right to trade. Records exist of litigation in relation to the privileges of, among others, barbers and surgeons,⁷⁷ bonnetmakers, shoemakers and tailors,⁷⁸ merchants,⁷⁹ waulkers,⁸⁰ the Society of Writers to the Signet,⁸¹ and of course the royal burghs, which had trading privileges granted by charter.⁸² A typical clause constituting such an exclusive privilege is given by Kames as:⁸³

⁷⁴ Collier, *Patents* (n 73) 123.

⁷⁵ J Wilhelm von Archenholz, *A Picture of England: containing a Description of the Laws, Customs, and Manners of England* (1791) 20.

⁷⁶ Lord Kames, *Historical Law-Tracts*, 4th edn (1792) 203.

⁷⁷ Sir Hew Dalrymple, *Information for the Hairdressers in Edinburgh; against the Incorporation of Barbers* (1758); *Memorial for the Incorporation of Barbers of Edinburgh, defenders, against James Murray and others* (1761).

⁷⁸ James Ferguson, *Answers for James Ferguson and Matthew Brown merchant-tailors in Kilmarnock, and for the Boxmasters of the Bonnetmakers, Shoemakers, Tailors &c* (1761).

⁷⁹ W Flockhart, *Information for William Flockhart, for himself, and for the Incorporated Trades of Dunfermline, suspenders, against James Hog* (1741).

⁸⁰ *Answers for the Incorporation of Waukers in Dundee; to the petition of David Brown, at the east mill of Craigie* (1763).

⁸¹ *Acts and Regulations of the Society of Clerks to His Majesty’s Signet* (1811) and the petition discussed at 35-36.

⁸² Lord Kames, *Elucidations respecting the Common and Statute Law of Scotland* (1800) 53.

⁸³ Kames, *Elucidations* (n 82) 53.

That the burgesses shall have free liberty of commerce; and that there shall be liberty of admitting bakers, tailors, shoemakers & c. with power to the said artificers to exercise their respective crafts, as freely as is done in other burghs.

To exclusive privilege was also attributed rights as diverse as the monopoly right to create port and ferry facilities,⁸⁴ the right to hunt down game once the chase has started,⁸⁵ and the right of an heir between the death of the last proprietor and the inheritance.⁸⁶

The importance of exclusive privilege to commerce can be illustrated by the views of an English jurist, John Dyer Collier, writing in 1803. The evil of monopolies, Collier wrote, had evolved into a mainstay of commerce. “[I]n England monopolies did not deviate from their ordinary character of artifice; but that, by the wisdom of the nation, this poison of the state has been deprived of all its pernicious ingredients, and has been converted into a nutritious aliment, applicable to the support of commercial prosperity.”⁸⁷

Alongside intangible trade rights, exclusive privilege was applied to intangible property rights—to copyright and patents.⁸⁸ Hector MacQueen has observed that in Scotland “the firm view came to be that copyright was not a right of property but a form of statutory monopoly, restricting for reasons of public policy what would otherwise be the natural liberties of mankind”.⁸⁹ In the eighteenth century, however, the classification of intellectual property was not fixed either as “property” or as “privilege”. Morison’s *Dictionary of Decisions*, for example, records a number of cases under the heading “Literary Property”, some of which related to the right of the author in works which were intended to remain unpublished and were not therefore covered by the Statute of Anne 1710.⁹⁰

The historical debate may partly be coloured by the increasing use of the language of property in the nineteenth century, as the market economy grew in importance. This gave rise to a “back-reading”,⁹¹ according to Ronan Deazley, and encouraged the idea that the Statute of Anne had been passed to protect the labour of authors and their property in that labour. In doing so, the Statute

⁸⁴ Reid, *Property* (n 71) para 336.

⁸⁵ Smith, *Lectures on Jurisprudence* (n 70) 11, 82.

⁸⁶ Smith, *Lectures on Jurisprudence* (n 70) 11, 81; Baron David Hume, *Lectures 1786-1822* vol IV (ed G C H Paton, Stair Society vol 17, 1955) 38.

⁸⁷ Collier, *Patents* (n 73) 12. Kames, *Elucidations* (n 82) 53 also acknowledged that the grant of exclusive privileges was done for the sake of commerce.

⁸⁸ Hume, *Lectures* vol IV (n 86) 59-72.

⁸⁹ H L MacQueen, *Copyright, Competition and Industrial Design*, 2nd edn (1995) 3.

⁹⁰ For example, *Dodsley v McFarquhar* (1775) Mor 8308.

⁹¹ R Deazley, *On the Origin of the Right to Copy: Charting the Movement of Copyright Law in Eighteenth-Century Britain (1695-1775)* (2004) xxiii.

had allegedly over-turned a common law notion of copyright in published works⁹² and replaced it with a limited monopoly right of only fourteen years. In fact, as Professor Deazley shows, there seems to have been no comparable concept of copyright or authors' rights prior to the Statute of Anne, and the notion of the common law rights was constructed, post-legislation, in the eighteenth century and thereafter.⁹³ Deazley's analysis would support the notion of copyright as a right of exclusive privilege, created by statute, rather than as a property right arising at common law. If nothing else, this debate demonstrates that intangibles that are initially protected through a limited statutory right can evolve to reflect the changing society in which they are situated.

As the above examples reveal, the concept of exclusive privilege was widely used over a lengthy period of time – the examples above span the fifteenth to the nineteenth centuries – to denote a monopoly right enjoyed by one party to the exclusion of others. Over time, the subject of the monopolies shifted from what we would class as public law or administrative functions to private law or commercial ones. Exclusive privileges were no longer state-controlled but rather state-administered, through legislation which, in the case of copyright and patents, awarded the monopoly to anyone who created or invented in accordance with the statute.

The broad-ranging application of this concept makes it somewhat surprising that, despite its historical pedigree, it is frequently overlooked in Scots law today.⁹⁴ Although the historical classes of exclusive privilege have largely lost their relevance, the concept is potentially of considerable utility for the protection of more modern rights including intellectual property and, critically, publicity. Of primary importance in this context is the fact that exclusive privilege is a real right without a "thing" as its object. It is therefore no objection that, as previously discussed,⁹⁵ *persona* cannot be classified as a thing. Further, Kenneth Reid's definition of exclusive privilege – an exclusive and valuable right to do something and to prevent others from doing the same thing⁹⁶ – sounds very much like the right that individuals try to exploit and protect in publicity situations.

92 Unpublished works remained subject to different principles until their regulation under the Copyright Act 1911 and their eventual assimilation to published works in the Copyright, Designs and Patents Act 1988. See, for example, Deazley, *Origin of the Right to Copy* (n 91) 220; MacQueen et al, *Contemporary Intellectual Property* (n 59) paras 2.4-2.6.

93 Deazley, *Origin of the Right to Copy* (n 91) 221-226.

94 For example, there is no reference to it in the index of W M Gloag and R C Henderson, *The Law of Scotland*, 12th edn, by Lord Coulsfield and H L MacQueen (2007), while Reid, *Property* (n 71) devotes one paragraph to it (para 5(8)).

95 At C.(1) above.

96 Reid, *Property* (n 71) para 5(8).

(2) Publicity as exclusive privilege

As has been shown, publicity is a difficult right to classify, in part because of the tension caused by its commercial and its dignitarian facets. Neither ownership nor personal right can capture the complexity of a right which is inseparable from its holder but good against the world, which is personal to the individual but of considerable commercial importance, and which can be licensed but not assigned. A much more convincing classification of publicity in Scots law is as a right of exclusive privilege. While personal rights may be used to enforce an individual's right against a particular party, the right of publicity needs to be good against the world and capable of being licensed. This would suggest that publicity is a real right. Yet the real right of ownership cannot be engaged, since persona is not a "thing". Thus, publicity use of persona falls most appropriately into the category of rights of exclusive privilege, which recognises real rights in monopolies without the need for a thing.

Support for this analysis can be drawn from the case, already mentioned, which created the right of publicity in America, *Haelan Laboratories v Topps Chewing Gum Inc.*⁹⁷ While the focus has typically been placed on the property implications of Judge Frank's words, quoted above, the full quotation reads: "We think that, in addition to and independent of that right of privacy (which in New York derives from statute), a man has a right in the publicity value of his photograph, *i.e.*, *the right to grant the exclusive privilege of publishing his picture...*"⁹⁸

A further advantage of attributing the right to exploit persona through publicity to an exclusive privilege relates to the authorised/unauthorised distinction drawn above. Whereas the focus of this article has been primarily on actions to address unauthorised use, exclusive privilege provides for both. Thus, on the one hand, unauthorised use of persona would be a breach of the monopoly right; on the other, the right could be licensed by the individual, in a manner similar to the licence of intellectual property rights, thereby enabling authorised exploitation.

The question then arises how a right of exclusive privilege in persona might be recognised in Scots law. It is suggested that any such right would require to be statutory.⁹⁹ The main rights of exclusive privilege still in evidence today have their basis in statute. Whether classed as a right of exclusive privilege or as property subject to ownership, intellectual property rights arise from statutory grants, and

⁹⁷ 202 F 2d 866 (2nd Cir 1953). See C.(1) above.

⁹⁸ At 868 (emphasis added).

⁹⁹ This raises a question as to legislative competence. It is suggested that the Scottish Parliament could introduce a new statutory right of exclusive privilege because "private law" is not reserved, although intellectual property matters are: Scotland Act 1998 s 126, Sch 5 Head C4. See also Whitty (n 39) at para 3.4.9 n 322.

any increase in the scope of these rights results from legislative amendment rather than judicial development. Similarly, the available evidence suggests that most, if not all, of the historic monopolies were dependent on a statutory grant, whether from Parliament or from the local burgh.

To create a right of publicity by statute would allow for a holistic, coherent and consistent approach, framed within the established category of exclusive privilege. This would be in contrast to the *ad hoc*, and often opportunistic, development of new rights through litigation which, of necessity, is limited by the scope of the individual action before the court.¹⁰⁰ A legislative solution could accommodate both the commercial and the dignitarian interests in the monopoly right, as indeed copyright demonstrates. The scope of the right, its limitations, the method for exploitation, and the remedies for breach could all be clearly specified, thus encompassing both authorised and unauthorised exploitation in one measure. Legislation would also address the doubt as to whether rights of exclusive privilege are susceptible to transfer, since it would be in the power of the statute expressly to enable, or prohibit, any assignation or licence of persona. Given the conclusions drawn above regarding the transferability of persona, it is suggested that an outright assignation should not be possible, whereas a temporary right to use in the form of a licence should be allowed. Further, a statutory grant could provide that any licensee of persona acquires a right enforceable against the world.¹⁰¹ A final advantage is that the right could be framed in such a way as to reflect competing interests and permitted uses, thereby avoiding the dangers of an “overbroad” right in persona.¹⁰²

While this article has attempted to find a principled home for publicity in Scots law, any legislative developments would need to consider the checks and balances in much greater detail. That is a challenge for another day, but any such initiative would be informed and enhanced by the classification of publicity as a right of exclusive privilege.

100 See, for example, R Buxton, “How the common law gets made: *Hedley Byrne* and other cautionary tales” (2009) 125 LQR 60; also Westfall & D Landau (n 14).

101 This would enable a claim such as that made by *OK!* against *Hello!*, but without the need in Scots law for the “licence in equity” relied upon by the House of Lords: *OBG v Allan* [2008] 1 AC 1.

102 For an analysis of the dangers of an “overbroad” property right of publicity in the US, see V M de Grandpre, “Understanding the market for celebrity: an economic analysis of the right of publicity” (2001-2002) 12 Fordham Intellectual Property, Media and Entertainment LJ 73. See also Westfall & Landau (n 14) for an account of the expansionist tendencies of common law property rights, arising from the “property syllogism”.